Arab Malaysian Finance Bhd v Kah Motor Co Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–172 OF 2004
TENGKU BAHARUDIN SHAH, ABDULL HAMID EMBONG AND ABDUL MALIK ISHAK JJCA
2 APRIL 2010

Contract — Terms — Condition precedent — Nature and effect of — Whether fulfilled by plaintiff

Evidence — Estoppel — Conduct by — Whether existed — Evidence Act 1950 s 115

Cahaya Motor ('CM') obtained financing from the Arab Malaysian Finance Bhd ('the defendant') for the purchase of Honda cars from Kah Motor ('the plaintiff') for sale to the public. The financing arrangement was such that CM would order the cars from the plaintiff which then informed the defendant which then issued letters of undertaking to the plaintiff to pay it for the cars sold and delivered to CM. However there were several conditions precedent to be fulfilled by the plaintiff before the defendant would disburse the moneys, namely the delivery of several documents to the defendant. The plaintiff then sold and delivered several cars to CM but the defendant failed to disburse any money. The defendant alleged that the plaintiff had failed to forward it the relevant documents in respect of the sales and the plaintiff had therefore not complied with the conditions precedent. The plaintiff had in fact sent the documents to a wrong address. The plaintiff however obtained judgment against the defendant in the High Court. The defendant appealed to the Court of Appeal.

Held, allowing the defendant's appeal with costs:

(1) Where the condition is precedent, the agreement is not fully binding until the event occurs. And where the condition is subsequent, there is a binding agreement until the event occurs. Conditions precedent are terms to the effect that unless a particular event occurs either no contract arises (a condition precedent to the contract as a whole) or, although a contract may have arisen, its performance, in whole or in part, cannot be enforced (a condition precedent to performance). In the instant case, the conditions precedent were not fulfilled by the plaintiff and the defendant was not obliged to pay the sums demanded by the plaintiff (see paras 14–15 & 20).

(2) In the instant case, the plaintiff had failed to discharge its burden of proof (see para 25).

(3) There was an inadequate judicial appreciation of the evidence as adduced. Appellate intervention was called for in the instant appeal (see para 27).

(4) There could be no estoppel in the instant appeal (see para 51).

[Bahasa Malaysia summary

Cahaya Motor ('CM') telah memperoleh pembiayaan daripada Arab Malaysia Finance Bhd ('defendan') bagi pembelian kereta-kereta Honda daripada Kah Motor ('plaintif') untuk jualan kepada orang awam. Pengurusan kewangan tersebut adalah di mana CM akan menempah kereta-kereta tersebut daripada plaintif yang akan memaklumkan defendan yang kemudiannya akan mengeluarkan surat-surat akujanji kepada plaintif untuk membayarnya bagi kereta-kereta yang telah dijual dan dihantar kepada CM. Walau bagaimanapun, terdapat beberapa syarat-syarat duluan yang perlu dipenuhi oleh plaintif sebelum defendan membayar wang tersebut, iaitu penyerahan beberapa dokumen kepada defendan. Plaintif kemudiannya menjual dan menghantar beberapa buah kereta kepada CM tetapi defendan gagal membayar wang tersebut. Defendan mendakwa bahawa plaintif gagal menyerahkan kepadanya dokumen-dokumen yang relevan berkaitan dengan penjualan tersebut dan plaintif oleh itu gagal mematuhi syarat-syarat duluan itu. Plaintif sebenarnya telah menyerahkan dokumen-dokumen tersebut ke alamat yang salah. Plaintif walau bagaimanapun telah memperoleh penghakiman terhadap defendan di Mahkamah Tinggi. Defendan telah membuat rayuan di Mahkamah Rayuan.

Diputuskan, membenarkan rayuan defendan dengan kos:

(1) Apabila syarat adalah mendahului, perjanjian tersebut tidak akan mengikat dengan sepenuhnya sehingga keadaan itu terjadi. Dan apabila syarat adalah kemudian, wujud satu perjanjian mengikat sehingga keadaan itu terjadi. Syarat-syarat duluan adalah terma-terma yang menyatakan melainkan sesuatu keadaan berbangkit sama ada suatu kontrak tidak wujud (syarat duluan kepada kontrak secara keseluruhan) atau, di mana suatu kontrak mungkin wujud, pelaksanaannya secara keseluruhan atau sebahagian, tidak boleh dikuatkuasakan (syarat duluan kepada pelaksanaan). Dalam kes ini, syarat-syarat duluan tidak dipenuhi oleh plaintif dan defendan tidak wajib membayar jumlah yang dituntut oleh plaintif (lihat perenggan 14–15 & 20).

(2) Dalam kes ini, plaintif gagal melaksanakan beban pembuktiannya (lihat perenggan 25).

(3) Tidak terdapat pengamatan mendalam yang mencukupi terhadap keterangan sepertimana yang dikemukakan. Campur tangan Mahkamah Rayuan diharuskan dalam rayuan ini (lihat perenggan 27).

(4) Tiada estopel dalam rayuan ini (lihat perenggan 51).]

Notes

For cases on condition precedent, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5331–5339.

For cases on conduct by estoppel, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1416–1422.

Cases referred to

Clarke v Edinburgh & District Tramways Co [1919] SC 35, HL (refd)

Director of Public Prosecutions v Kilbourne [1973] AC 729, HL (refd)

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Gilbert J McCaul (Australia) Pty Ltd v Pitt Club Ltd (1956) 57 SR(NSW) 332 (refd)

Hanshim Corp Sdn Bhd v New York Plastic Co Pte Ltd [1990] 1 MLJ 345, CA (refd)

How Paik Too v Mohideen [1968] 1 MLJ 51, FC (refd)

John Pym v Robert James Roy Campbell, James Thompson Mackenzie and Richard Pastor Pritchard (1856) 119 ER 903; 6 El & Bl 370 (refd)

Maharaja Sris Chandra Nandy & Anor v Rakhalananda Thakur & Ors AIR 1941 PC 16

MK (Project Management) Ltd v Baker Marine Energy Pte Ltd [1995] 1 SLR 36, CA (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

Perri & Anor v Coolangatta Investments Proprietary Ltd (1981–1982) 149 CLR 537 (refd)

R v Harz; R v Power [1966] 3 All ER 433, CA (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Sundram v Arujunan & Anor [1994] 3 MLJ 361, SC (refd)

Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87, HC (refd)

Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401, SC (refd)

Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 QB 297, CA (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41, PC (refd)

V Veeriah v General Manager, Keretapi Tanah Melayu [1974] 1 MLJ 201, HC

Watt or Thomas v Thomas [1947] AC 484, HL (refd)

Yeap Leong Huat v Yeap Leong Soon & Anor and another application [1989] 3 MLJ 157, SC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Evidence Act 1950 s 115

Appeal from: Suit No D3–22–907 of 2000 (High Court, Kuala Lumpur)

GK Ganeson (SP Tan and CY Sing with him) (Abd Aziz Chen & Co) for the defendant/appellant.
Joginder Singh (Savinderjeet Singh with him) (Joginder Singh & Co) for the plaintiff/respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

[1] The parties will be referred to like what they were referred to by the learned trial judge of the High Court. Thus, Kah Motor Co Sdn Bhd will be referred to as the plaintiff and Arab Malaysian Finance Bhd will be referred to as the defendant.

[2] After the full trial, the learned trial judge of the High Court gave judgment in favour of the plaintiff with interest and costs. Aggrieved by that decision, the defendant filed an appeal to this court.

FACTS OF THE CASE

[3] At all material times, the plaintiff was a distributor of and/or dealer of Honda cars.

[4] At all material times, the defendant was and is a licensed finance company within the meaning of the Banking and Financial Institutions Act 1989. And at all material times, the defendant carried on its business at its branch at Lots 3 & 4, ground floor, block 'Y', Bandar Ramai-Ramai, Jalan Leila, 90000 Sandakan.

[5] At all material times, Cahaya Motor (Sabah) Sdn Bhd ('Cahaya Motor') was the defendant's customer. Cahaya Motor was in the motorcar trade of buying and selling cars. Cahaya Motor wanted to purchase Honda cars from the plaintiff for sale to the public. And to expedite that purchase, Cahaya Motor obtained credit facilities from the defendant.

[6] The defendant granted and subsequently increased the floor stocking facilities to Cahaya Motor as evidenced by the respective letters of offer and the facility agreements dated 12 June 1989, 12 May 1990 and 21 January 1991. And at all material times, Cahaya Motor carried on its business at block 'A', Lot 9, ground floor, Bandar Nam Tung, Sandakan.

[7] Under the said facilities, Cahaya Motor ordered the Honda cars it wanted from the plaintiff who then informed the defendant. The defendant then gave letters of undertaking to the plaintiff to pay the plaintiff for the price of the Honda cars sold and delivered to Cahaya Motor by the plaintiff.

[8] The plaintiff duly sold and delivered the Honda cars to Cahaya Motor based on the undertakings given to the plaintiff by the defendant to pay the price to the plaintiff. The stand of the plaintiff was that it had complied with all the terms and conditions of the said undertakings.

[9] The plaintiff claimed against the defendant for the sum of RM347,518.36 being the balance of monies due and payable by the defendant under the said undertakings given to the plaintiff by the defendant. The breakdown of the sums owed by the defendant to the plaintiff can be seen in the plaintiff's amended statement of claim and they are now reproduced herein:

Particulars

No	*Type of Vehicles*	*Engine No*	*Chasis No*	*Date*	*Invoice Number*	*Amount RM*
1.	Honda Accord	MA422-100379	CD4-600399	19/5/94	EMO2722	82,096.65
2.	Honda Accord	MA422-200532	CD4-700517	19/5/94	EMO2724	85,771.09
3.	Honda Accord	MA422-201388	CD4-701422	17/8/94	EMO2858	86,521.09
4.	Honda Accord	MA422-201588	CD4-701584	08/9/94	EMO2915	87,433.09
5.	Honda Accord	MA422-202291	CD4-702324	16/12/94	EMO3001	87,793.09
						429,615.01
Less payment made in respect of EM02722						82,096.65
Outstanding amount due to Plaintiff						347,518.36

[10] Repeated demands made by the plaintiff to the defendant fell on deaf ears and the plaintiff claimed for:

(a) the sum of RM347,518.36;

(b) interest on the said sum of RM347,518.36 at 8% pa from 1 January 1998 to the date of payment;

(c) further or other order; and

(d) costs.

[11] The defendant by its defence averred that there were four conditions precedent to be fulfilled before the disbursement of the facility by the defendant to Cahaya Motor and/or to the plaintiff would take place. The plaintiff must comply with these four conditions precedent and shall deliver them to the defendant, namely:

(a) the original invoice issued to the defendant in respect of the Honda cars;

(b) the original custom excise Form 7 in respect of the Honda cars;

(c) the original marine cargo all risks insurance policy in respect of the Honda cars with the defendant's interest endorsed therein; and

(d) all other relevant original shipping and custom declaration documents in respect of the Honda cars.

[12] All these four original documents served as security for repayment of the facility granted to Cahaya Motor.

[13] It is trite law that whether a contract is operative, or even exists, may depend upon a contingency. Put differently, it can be said that the operation of a contract may be subject to a condition precedent. And until the condition precedent occurs, the contract is inoperative.

[14] Where the condition is precedent, the agreement is not fully binding until the event occurs. And where the condition is subsequent, there is a binding agreement until the event occurs.

[15] Conditions precedent are terms to the effect that unless a particular event occurs either no contract arises (a condition precedent to the contract as a whole) or, although a contract may have arisen, its performance, in whole or in part, cannot be enforced (a condition precedent to performance). A classic example of the former category can be found in the case of *Gilbert J McCaul (Australia) Pty Ltd v Pitt Club Ltd* (1956) 57 SR(NSW) 332; while a good example of the latter category is *Perri & Anor v Coolangatta Investments Proprietary Ltd* (1981–1982) 149 CLR 537.

[16] The facts in *Gilbert J McCaul (Australia) Pty Ltd v Pitt Club Ltd* may be stated as follows. There, in a five year lease there was a clause giving the tenant an option of a further five years subject to two conditions — three months' notice of intention to exercise the option, and the punctual payment

of rent and due performance of all covenants during the term of the original lease. During the first five years, the tenant frequently failed to pay the rent punctually. The tenant did, however, give the three months' notice required to exercise the option. The lessor refused the renewal. The tenant sued. It was held that punctual payment of rent was a condition precedent to the tenant's right to exercise the option. The fact that the lessor had never complained about the tenant's lack of punctuality was not a waiver of that condition precedent. The tenant had not complied with it and hence could not demand renewal.

[17] We now make reference to the case of *Perri & Anor v Coolangatta Investments Proprietary Ltd*. The parties in that case contracted for the sale and purchase of a block of land. The contract stipulated that it was entered into 'subject to purchasers completing a sale of their property at No 9 Korokan Road, Lilli Pilli'. Several months passed, the Lilli Pilli property remained unsold and, finally, the vendor company advised the *Perris* that it was terminating the contract. The *Perris* disputed the company's right to do so. It was held that whilst the contract was perfectly valid, the sale of Lilli Pilli property was a condition precedent to the obligation to settle. Until the Lilli Pilli property was sold, settlement could not be demanded. However, if that sale did not take place within a reasonable time, either party could elect to bring the contract to an end provided they themselves were not in default. Consequently, it was held that the company's termination was valid.

[18] Yet another case to refer to would be the case of *John Pym v Robert James Roy Campbell, James Thompson Mackenzie and Richard Pastor Pritchard* (1856) 119 ER 903; 6 El & Bl 370. The plaintiff in that case wished to sell to the defendant a share in an invention of the plaintiff. A written document appeared to contain an agreement for the purchase. The plaintiff sought to rely upon it but the defendant established that the parties had further agreed that the written agreement was to be the agreement only if the plaintiff's invention was approved by a third party, Abernethie. Unfortunately, Abernethie had not given his approval of the invention. The court held that there was no contract at all. Abernethie's approval was a condition precedent to the existence of the contract.

[19] Lord Denning LJ in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at p 304, aptly said:

> Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition that is an essential term of the contract. In those cases the provision of

the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

[20] We will demonstrate, in due course, that the conditions precedent were not fulfilled by the plaintiff and the defendant was not obliged to pay the sum of RM347,518.36 as demanded by the plaintiff. Meanwhile, we will continue to narrate the facts of the case.

[21] The defendant further averred in its defence that the defendant had accordingly issued a conditional letter of undertaking directly to the plaintiff in order to make payment to the plaintiff on behalf of Cahaya Motor for the Honda cars supplied by the plaintiff to Cahaya Motor *provided that the plaintiff shall first deliver the four original documents to the defendant*.

[22] In regard to the averments at para 7 of the amended statement of claim, the defendant in its defence at para 7 denied any knowledge that the plaintiff had duly sold and delivered the Honda cars to Cahaya Motor and the defendant further averred and denied the allegation that the plaintiff had complied with all the terms and conditions of the conditional letter of undertakings and the defendant categorically put the plaintiff to strict proof thereof.

[23] The defendant averred in its defence that it gave the plaintiff the benefit of doubt out of goodwill by requesting the plaintiff for the documentary proof of delivery of the four original documents to the defendant but despite repeated reminders on several occasions by the defendant to the plaintiff requesting for the documentary proof of delivery of the four original documents to the defendant, to date the defendant has not received the documentary proof of delivery of those documents.

[24] For these reasons, the defendant prayed that the plaintiff's action be dismissed with costs and the defendant also averred that the plaintiff had failed to disclose any reasonable cause of action or that the action was scandalous, frivolous, mischievous or vexatious or an abuse of the process of the court.

ANALYSIS

[25] Having perused through the appeal record, it is appropriate to pose this salient question: 'Has the plaintiff discharged its burden of proof?' Azmi LP in *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 (FC), writing a separate majority judgment, aptly said:

I am afraid I cannot understand this argument. Viscount Maugham in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd The Kingswood* [1941] 2 All ER 165 at p 179 dealing with the question of burden of proof in that case says this: A

Agreeing with the trial judge, I think the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat non ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons. B

That rule means 'the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof. C

The learned authors of *Sarkar on Evidence* express the view that s 101 of the Evidence Ordinance is based on that rule. D

[26] We would answer the question posed in the negative.

[27] We will also demonstrate that there was an inadequate judicial appreciation of the evidence as adduced. Appellate intervention is called for in this appeal. The Privy Council speaking through Lord Fraser of Tullybelton in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 (PC), at p 42, made reference to the case of *Clarke v Edinburgh & District Tramways Co* [1919] SC 35 (HL) where the following principles of law were laid down: E F

When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied G H I

in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

The first part of that quotation from the speech of Viscount Sankey shows that there is no room for an argument which was at least adumbrated on behalf of the respondent in the instant appeal to the effect that the principle of Thomas does not apply to the appeal to the Federal Court because it is the appeal by way of rehearing — Courts of Judicature Act 1964 s 69. Their Lordships would add that the instant case falls within the class referred to in the quotation from *Clarke v Edinburgh Tramways Co* [1919] SC 35 (HL) at p 36 in which the judge has announced as part of his judgment that he believes one set of witnesses and disbelieves the other.

[28] And this very passage was cited with approval by the Brunei Court of Appeal in the case of *Hanshim Corp Sdn Bhd v New York Plastic Co Pte Ltd* [1990] 1 MLJ 345 (CA).

[29] In *Watt or Thomas v Thomas* [1947] AC 484 (HL), all the Law Lords wrote separate judgments. However, the judgment of Lord Thankerton deserves mention. There at pp 487–488, His Lordship set out the approach to be adopted by the appellate court in these erudite terms:

I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion: II) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence: III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves; and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage. Normally the cruelty is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no footrule by which to measure the personalities of the spouses. In cases such as the present, it will be almost invariably found that a divided household promotes partisanship, and it is difficult to get unbiased evidence.

[30] These fundamental principles of law have been applied vigorously in numerous cases. Suffice for us to make mention of only two of them, namely:

(a) *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 (HC). Singapore, CA Singapore, and Privy Council; and

(b) *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC) Malaysia.

[31] Now, where the credibility of witnesses is not in issue and the only concern of the Court of Appeal is to determine whether the trial judge has drawn proper inferences from the facts, the Court of Appeal is in just as good a position as the trial judge to evaluate and assess the evidence. In these circumstances, the appellate court will give the appropriate weight to the opinion of the trial judge but at the same time it may form its own independent opinion on the inferences to be drawn.

[32] Lee Hun Hoe (CJ Borneo) speaking for the Supreme Court in *Yeap Leong Huat v Yeap Leong Soon & Anor and another application* [1989] 3 MLJ 157, aptly said, at p 161 of the report:

> An appellate court should not interfere with the finding of facts by the learned judge who has seen and heard the witnesses and is in a better position to assess their credibilities. On the other hand, the defendants contended that the learned judge erred primarily in drawing the wrong inferences from established facts. It is trite law that, on the question of evaluation of facts, the appellate court is in as good a position as the trial judge to evaluate those facts: *Watt v Thomas* [1947] All ER 582; *Benmax v Austin* [1955]1 All ER 326; *Tithes Dental & Photo Supply Sdn Bhd v Empresa Lineas Maritimes Argentinas & Ors* [1977] 2 MLJ 13; *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41. An appellate court can also review a trial court's decision if the reasons are unsatisfactory and contradictory: *Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165 or if in reaching its conclusion the learned judge has not properly analysed the entirety of the evidence which was given before him: *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165.

[33] Edgar Joseph Jr SCJ delivering the majority judgment of the Supreme Court in *Sundram v Arujunan & Anor* [1994] 3 MLJ 361, had this to say at p 373 of the report:

> By way of postlude, we must add a final point regarding this part of the case lest we be accused of an oversight. We recognise, as we must, that a Court of Appeal will naturally be reluctant to interfere with a finding of fact by the trial judge who has had the inestimable advantage of watching the demeanour of the witnesses, 'their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial' (per Lord Macmillan in *Watt v Thomas* [1947] AC 484 at pp 490–491; [1947] 1 All ER 582 at p 590). But, having said that, we would draw attention to the familiar principle that there is a

distinction between the finding of a specific fact and the finding of a fact which is really an inference drawn from the facts specifically found. In the latter case — and the present case is such a case — the appellate court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts (see *Benmax v Austin Motor Co Ltd* [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418).

[34] In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA), this court speaking jointly through Gopal Sri Ram and Mahadev Shankar JJCA rightly said at pp 398–399 of the report:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[35] The Singapore Court of Appeal in *MK (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1995] 1 SLR 36, echoed the same sentiments as seen at the headnotes at p 37. There it was stated that:

> (1) Appellate courts are exceedingly slow to overturn findings of fact based on evidence given by witnesses which the trial judge had the advantage of hearing first-hand but this reluctance is not quite so pronounced when the findings of fact are actually inferences made from primary facts which are not in dispute. The learned judicial commissioner's findings that there was no certainty as to when the commission was to become payable and that no commission was payable until the financial package was finalised, fell into the latter category. It was far from clear that the letters suggested that the commission would only become payable if the financial package was finalised. At the same time, the respondents never pleaded that the parties had agreed to the commission being conditional upon the financial package being arranged. It was not open to the learned judicial commissioner to make this finding of fact in the absence of an amendment to the pleadings.

[36] Steve Shim CJ (Sabah & Sarawak) writing for the Federal Court in *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* at pp 10–11 (MLJ); 320–321 (CLJ), aptly said:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to

such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

[37] Here, the main issue that arose for determination before the learned trial judge of the High Court was whether the plaintiff had proven by way of documentary evidence the delivery of the four original documents as specified in the letters of undertaking by the plaintiff to the defendant? If the answer is in the affirmative, then the defendant shall be bound by its undertaking to pay the sum claimed by the plaintiff.

[38] The live issue pursued before the High Court and before this court was this (see para 1 of the memorandum of appeal):

The learned judge erred in law and in fact in holding that the appellant is estopped through 'convention' from denying that the appellant did not receive from the respondent the original documents pursuant to the letters of undertaking. The learned judge ought to have held that the respondent did not satisfy the conditions to be met under the doctrine of estoppel.

[39] Put in another way:

Whether the trial judge's invocation of the equitable doctrine of estoppel by convention was justified in the circumstances of the case?

[40] Now, it must be borne in mind that in the amended statement of claim:

(a) there was no allegation of estoppel;

(b) no facts were alluded to about estoppel;

(c) no mention was made about any variation of the terms of the letters of undertaking; and

(d) neither was there any statement about any mistake of fact or mistake of law.

[41] The letter of undertaking dated 19 May 1994 from the defendant to the plaintiff can be seen at pp 278–279 of the appeal record and it was worded in this way:

RE: CAHAYA MOTOR SABAH SDN BHD, SANDAKAN FLOOR STOCKING FACILITY OF RM600,000.00

Your letter dated 19-5-94 faxed to us on 19-5-94 refers.

Please be informed that payment for the following vehicles will be remitted to your company within two (2) weeks upon confirmation of receipt of Bill of Lading *and* the receipt of other related documents stated herein.

TYPE OF VEHICLE	COLOUR	ENGINE NO:	CHASSIS NO:	AMOUNT (RM)
Honda Accord	SB/IV	MA422-100383	CD4-600396	RM 82,096.65
Honda Accord	SB/IV	MA422-100379	CD4-600399	RM 82,096.65
Honda Accord	NB/IV	MA422-200712	CD4-700708	RM 86,521.09
Honda Accord	CR/IV	MA422-200532	CD4-700517	RM 85,771.09
	Total:-	RM336,485.48		

OTHER RELATED DOCUMENTS REQUIRED:

(a) Original Invoice(s) issued to Arab-Malaysian Finance Berhad for the account of Cahaya Motor (Sabah) Sdn Bhd, Sandakan;

(b) Original Certificate(s) on Motor Vehicles released from assembly plants issued for each vehicle (Custom Excise Form 7);

(c) Original Marine Cargo All Risks Insurance policy for the full insurable value of the vehicle(s) with Arab-Malaysian Finance Berhad interest endorsed therein;

(d) All relevant Original Shipping and Customs Declaration documents;

(e) Original Letter of Undertaking from Kah Motor Company Sdn Bhd for the following:

(i) To deliver the Customs Excise Form 7 and Original Invoice(s) for custody with Arab-Malaysian Finance Berhad; and

(ii) To deliver the vehicle(s) to Cahaya Motor (S) Sdn Bhd, Sandakan upon written confirmation of payment from Arab-Malaysian Finance Berhad.

Another letter of undertaking dated 16 August 1994 from the defendant to the plaintiff can be seen at pp 310–311 of the appeal record. The requirements in this letter of undertaking are the same as the letter of undertaking dated 19 May 1994 at p 279 of the appeal record which have been reproduced.

[42] Yet another letter of undertaking dated 10 September 1994 from the defendant to the plaintiff can be seen at pp 325–326 of the appeal record. The requirements in this letter of undertaking are the same as the letter of undertaking dated 19 May 1994 at p 279 of the appeal record which have been reproduced.

[43] Again another letter of undertaking can be seen at pp 351–352 of the appeal record. It was undated. Likewise the requirements in this letter of undertaking are the same as the letter of undertaking dated 19 May 1994 at p 279 of the appeal record as reproduced earlier.

[44] We reiterate the crucial words in the letter of undertaking as seen at p 279 of the appeal record and we now reproduce those words, once again:

> (ii) To deliver the vehicle(s) to Cahaya Motor(s) Sdn Bhd, Sandakan upon written confirmation of payment from Arab-Malaysian Finance Bhd.

[45] The plaintiff sought to justify its action to deliver the four original documents to the wrong address by stating that the defendant did not object to the plaintiff sending those documents to Cahaya Motor. But, unfortunately, the plaintiff did not plead such an allegation nor adduced any evidence to support its allegation that the defendant did not object to the plaintiff sending the four original documents to Cahaya Motor.

[46] The plaintiff also sought to rely on the defendant's exhibit marked as 'D2' as seen at pp 227–228 of the appeal record to lend support to its supposition that the defendant did not object to the plaintiff sending the four original documents to Cahaya Motor. Now, exh 'D2' was a bill of lading designated as 'original' from the shipper to the consignee. The shipper was:

> Kah Motor Co Sdn Bhd (Pg)
>
> No: 4 Leith Street
>
> 10200 Penang.

[47] While the consignee was:

> Arab Malaysian Finance Bhd
>
> A/C Syk Cahaya Motors (S) S/B
>
> Bandar Nam Tung, Blk 'A' Lot '9'
>
> Mile 2, Leila Rd, 90008 Sandakan.

[48] So, the plaintiff claimed that the defendant was estopped from denying non receipt of all the four original documents through the doctrine of estoppel by convention and conduct. The learned trial judge of the High Court also found that the defendant was estopped through 'convention' from denying that the defendant did not receive from the plaintiff the four original documents pursuant to the letters of undertaking.

[49] Mohamed Azmi J (later SCJ) in *V Veeriah v General Manager, Keretapi Tanah Melayu* [1974] 1 MLJ 201 at p 202, in the course of His Lordship's judgment had this to say in regard to the scope of estoppel in s 115 of the Evidence Act 1950:

> *Sarkar on Evidence* (12th Ed) at p 1033 states that there are seven prerequisites to bring a case within the scope of estoppel as defined in s 115. It was contended by the defence that all these prerequisites had been fulfilled, namely:
>
> (1) There must be a representation by a person or his authorised agent to another in any form — a declaration, act or omission.
>
> (2) The representation must have been of the existence of a fact and not of promises *de futuro* or intention which might or might not be enforceable in contract.
>
> (3) The representation must have meant to be relied upon, ie it must have been made under the circumstances which amounted to an intention causing or permitting belief in another. The proof of the intent might be direct or circumstantial, eg by conduct.
>
> (4) There must have been belief on the part of the other party in its truth.
>
> (5) There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment.
>
> (6) The misrepresentation or conduct or negligence must have been the proximate cause of leading the other party to act to his prejudice.
>
> (7) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of things or had means of knowledge, there can be no estoppel.
>
> Thus, for the defendant to succeed on the defence of estoppel, there must be ignorance on his part as to the real date of birth of the plaintiff. He must show that he was ignorant of the truth regarding the representation, but when both parties have equal means of knowledge of the fact, which in the present case was the plaintiff's date of birth, there can be no estoppel. Further, in my judgment, there can be no estoppel where the truth of the matter appears, as it did in the present case, on the face of the proceedings (see judgment of Lord Davey in *Tara Lal Singh v Sarobur Singh* 27 IA 33 at p 38). To my mind, this is a sound authority since estoppel is based on equity and good conscience with the object of preventing fraud and to secure justice between parties by promotion of

> honesty and good faith. From the agreed facts, it was common ground that the plaintiff was born on 2 June 1921 and not on 26 June 1916. His present Identity Card, EPF Membership Card and Citizenship Certificate all showed his date of birth as 1921 and not 1916. In fact, at the outset of the hearing, learned counsel for the defendant conceded that the plaintiff was born on 2 June 1921. Under the circumstances, there could be no estoppel arising out of this action when the truth of the plaintiff's date of birth appeared on the face of the proceedings and, as such, the plaintiff should not be estopped from denying his date of birth as 26 June 1916.

[50] Here, the plaintiff was not ignorant of the defendant's address. When the plaintiff received the letters of undertaking the defendant's address was stated boldly on the defendant's letter head. The plaintiff was certainly aware of the true state of things and had the means to find out the true state of the defendant's address. It is our judgment that there can be no estoppel in this appeal. It is also our judgment that the duty was on the plaintiff to prevent fraud by sending the four original documents directly to the defendant. If the four original documents were sent to the wrong address, that would provide an opportunity for someone to facilitate a fraud.

[51] The plaintiff was required to deliver the four original documents to the defendant at the defendant's address but failed to do so. The plaintiff should know what to do after all both 'the plaintiff and the defendant have had business dealings since before 1991' (see p 31 of the appeal record of the written judgment of the learned trial judge of the High Court).

[52] Next, the learned trial judge of the High Court placed undue reliance on the evidence of Sin Fook Sing ('DW1') in regard to forgery and authencity of the four original documents. With respect, both these two points were not facts in issue for the simple reason that they were not pleaded in the statement of defence. In the words of Ong Hock Thye FJ writing separately for the Federal Court in the case of *How Paik Too v Mohideen* [1968] 1 MLJ 51 at p 52:

> In the first place, the point was never pleaded in the defence; consequently it was not a fact in issue requiring the magistrate to make any finding thereon.

[53] We categorically say that against the backdrop of the defendant's pleaded defence, DW1's testimony was certainly relevant. In our judgment, the probative value of DW1's testimony cannot be doubted. It demonstrated the extent of the 'benefit of doubt' and 'goodwill' extended by the defendant to the plaintiff. DW1's evidence did not deviate from the pleaded defence. On the contrary, DW1's evidence was sufficiently relevant to an issue before

the court and therefore they are admissible. In *Director of Public Prosecutions v Kilbourne* [1973] AC 729 (HL) at p 756, Lord Simon of Glaisdale aptly said:

> Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in 'logical probativeness,' except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (ie, logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

[54] And in *R v Harz* ; *R v Power* [1966] 3 All ER 433 (Court of Criminal Appeal) at p 449, Thesiger J had this to say:

> The conclusions to be drawn from the authorities seem to be as follows:
>
> (i) The main general rule governing the entire subject is that evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant or insufficiently relevant should be excluded (*Cross on Evidence* (2nd Ed) pp 12–13). The word 'relevant' is used in the sense in which it is defined in art 1 of *Stephen's Digest of Law of Evidence* (12th Ed). It is there stated that the word:
>
> > means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connexion with other facts proves or renders probable the past ... existence ... of the other.
>
> Thus the word 'relevant' is to all intents and purposes synonymous with the phrase 'of probative value'.

[55] Chong Siew Fai CJ (Sabah & Sarawak) in *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 at p 409, said that:

> Of the law of evidence, the cardinal rule relating to relevancy is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible.

[56] Thus, when DW1 said that the letters of undertaking were doubtful documents that piece of evidence should be admissible because such evidence was not prejudicial to the plaintiff's claim.

[57] The learned trial judge of the High Court placed excessive reliance upon the evidence of Moganadegan a/l Erulappan ('PW2') that proof of posting were destroyed in a flood and His Lordship also failed to consider

that there was no evidence adduced to show that the flood actually occurred and that the flood had destroyed the proof of posting. Under cross-examination at p 113 of the appeal record, PW2 categorically said:

> I have proof of posting of documents sent to the defendant.

[58] But in the same breath, PW2 testified under cross-examination at p 113 of the appeal record that:

> In 1997 there was a flood under which all our documents at the office have been damaged and therefore I cannot produce this proof of posting of the documents to the defendant.

[59] This provoked the learned counsel for the defendant to advance this salient question to PW2 (see pp 113–114 of the appeal record):

> Q: I put it to you it is strange that the flood only destroyed the proof of posting documents and not the documents exhibited in this case.
>
> A: I do not agree.

[60] But, alas the plaintiff failed to adduce any evidence to show that the flood had indeed damaged the proof of posting. Under re-examination at pp 115–116 of the appeal record, PW2 testified that:

> In 1997 we kept the record of documents of proof of posting in a store at the ground floor of our office. We do not write on the board in our offices any proof of posting of documents. We write in our proof of posting of such documents in a full scap book. We write on this full scap book under the heading of Pos Laju and DHL. It is this full scap book that has been destroyed by the flood in that year 1997.

[61] We note that there was no evidence adduced as to the depth of the flood. Several pertinent questions immediately come to the forefront:

(a) was the flood that deep that only the documents on the third floor was saved?;

(b) was there a security guard who was on duty at the material time and who could come forward and give evidence?; and

(c) where exactly was the full scap book at the time of the flood?

[62] DW1 — the finance officer of the defendant, gave evidence and he testified at p 121 of the appeal record in this way:

A The plaintiff sent documents to the defendant company by way of courier service. Normally letters sent to the defendant are acknowledged by the defendant. The defendant will acknowledge on the courier company consignment note. If the defendant acknowledged receipt of the documents then there is proof that the documents were sent rightly to the defendant.

B

[63] This piece of damning evidence would certainly be in favour of the defendant in that if the full scap book was damaged or destroyed by the flood, then the plaintiff could still produce the consignment note as proof of delivery. Yet this was not done and we can only conclude that the plaintiff had C sent the four original documents to the wrong address.

[64] Next, the learned trial judge of the High Court erred in law and in fact in holding that the plaintiff had proved that the bills of lading and all the four original documents as stated in the letters of undertaking had been forwarded D to the defendant even though the covering letter enclosing the said documents were addressed to Cahaya Motor. On the evidence, we say that the learned trial judge of the High Court ought to have held that the bills of lading and all the four original documents as stated in the letters of undertaking had been forwarded to the wrong address and, consequently, the E learned trial judge of the High Court ought to have held that in the circumstances and by virtue of the nature of the transaction, it was improbable that the defendant had allowed the plaintiff to send the four original documents as stipulated in the letters of undertaking to Cahaya Motor and not to the defendant direct.

F

[65] Now, under the letters of undertaking the defendant required the plaintiff to issue the original invoice to:

Arab-Malaysian Finance Bhd for the account of Cahaya Motor (Sabah) Sdn Bhd, G Sandakan.

[66] At the top left hand corner just below the plaintiff's name and address of the invoice, the following words appeared:

H LOAN BY: M/S ARAB-MALAYSIAN FINANCE BHD

SOLD TO: A/C SYK CAHAYA MOTORS (S) S/B BANDAR NAM TUNG BLK 'A' LOT '9' MILE 2 LEILA RD 90008 SANDAKAN.

I **[67]** The invoice showed the defendant to be the lender while SYK CAHAYA MOTORS (S) S/B to be the buyer of all the Honda cars of the plaintiff. This was also set out in the agreed facts between the parties. The letters of undertaking stipulated that the original invoices must be issued to the defendant and for the account of '(A/C) of SYK CAHAYA MOTORS (S)

S/B'. That being the case, documents like the bill of lading and the permit to transport goods which relate to the delivery of the Honda cars to Cahaya Motor will have to have a similar name and address as shown in the invoices in order for the Honda cars to be delivered to Cahaya Motor. In short, from the documentary evidence it can readily be ascertained that the defendant was the lender and the actual buyer of the Honda cars from the plaintiff was Cahaya Motor. The Honda cars will have to be delivered to Cahaya Motor and it was for this reason that the bill of lading and the permit to transport goods reflected Cahaya Motor's address.

[68] It must be emphasised that Cahaya Motor's address was not the address of the defendant. And at all material times, the plaintiff knew the actual address of the defendant through the letters of undertaking.

[69] It must be borne in mind that Cahaya Motor's address was at:

> Bandar Nam Tung
> Blk 'A' Lot '9'
> Mile 2, Leila Road
> 90008 Sandakan.

[70] While the defendant's address was at:

> Lots 3 & 4, Ground Floor
> Blok 'Y', Bandar Ramai-Ramai
> Jalan Leila, 90000 Sandakan
> Sabah.

[71] Be it noted that the defendant's address was categorised as an agreed and undisputed facts.

[72] PW2 confirmed that he was, at all material times, the administrator/export manager of the plaintiff. And under cross-examination, PW2 testified that he was in charge of sending all the four original documents to the defendant. PW2 also testified, under cross-examination, at p 113 of the appeal record that:

> The address given in this letter is Arab-Malaysian Finance Berhad, Syarikat Cahaya Motor Sdn Bhd, Bandar Nam Tung, Block 'A', Lot '9', Mile 2, Leila Road, 90008 Sandakan. This is the address of the defendant financier. All this while all the relevant documents addressed to Arab-Malaysian Finance are sent to this address.

A **[73]** It was wrong for PW2 to say that Cahaya Motor's address was '... the address of the defendant financier'. Such an assertion certainly contradicted with the agreed facts.

B **[74]** Again, under cross-examination at pp 111–112 of the appeal record, PW2 had this to say:

> The buyer of the vehicles is the defendant company. I am sure of this fact. The defendant company is financing for Cahaya Motor Sabah (M) Sdn Bhd. I agree that the defendant company is the financier. I still maintain that the buyer in this
C case is the defendant company. The ordering of the vehicles were made by the defendant company.

D **[75]** It is rather unfortunate that this piece of evidence from PW2 contradicted PW2's earlier witness statement as seen at p 72 of the appeal record where he said in answer to Question 4:

> First of all Cahaya Motor will place order for motorcars it wished to purchase with the plaintiff.

E

F **[76]** It is perplexing that PW2 was unable to distinguish between a buyer of the Honda cars and a financier. It must be recalled to mind that PW2 joined the plaintiff in 1991. And the disputed claim arose in 1994 (see PW2's witness statement at p 72 of the appeal record). Based on the available evidence, we must conclude that PW2 who was in charge of sending all the four original documents to the defendant chose not to send all those documents to the defendant's address but instead to Cahaya Motor's address. The covering letters of the plaintiff enclosing all the four original documents
G would clearly show that the wrong address was chosen.

H **[77]** We categorically say that the names and addresses in the invoices, bills of lading and the permits to transport goods were correctly named and addressed. But, unfortunately, the addresses in the plaintiff's covering letters enclosing all the four original documents were wrongly addressed to Cahaya Motor's address. We say that the covering letter should be a straight forward letter addressed directly to the defendant without the need to mention that it was for the account of Cahaya Motor.

I **[78]** In our judgment, PW2 being an export manager should know the importance that all the four original documents should be sent directly to the defendant. We too hold that PW2 should have known that all the four original documents were security documents meant for the defendant. To say the least, the oversight by PW2 was quite fatal. The four conditions precedent

were not fulfilled by the plaintiff and the defendant was right in refusing to pay the sum of RM347,518.36 to the plaintiff as demanded.

[79] Going on an uphill task, the plaintiff resorted to certain payments made to the plaintiff by the defendant pursuant to the bills of lading in order to draw an inference that the defendant received all the four original documents. The defendant admitted paying for those Honda cars listed at items (1) and (2) in exh 'P1' as seen at p 353 of the appeal record for the simple reason that there was a letter from Cahaya Motor to the defendant requesting payment for the same. That letter was dated 8 June 1994 and it was worded in this way (see p 294 of the appeal record):

Re: Floor Stocking Facility

Shall be pleased if you could kindly arrange to pay Kah Motor Co. Sdn. Bhd., for an amount of RM164,193.30 being payment for 2 units of Honda Accord 2.2 EFI (M). Details are as follows:

Model	*Engine No*	*Chassis No*	*CIF Price*
Honda Accord 2.2 EFI (M)	MA422-100383	CD4-600396	RM 82,096.65
Honda Accord 2.2 EFI (M)	MA422-100379	CD4-600399	RM 82,096.65
	Total:	RM164,193.30 ==========	

We have secured firm buyers, M/S Indah Jadi Sdn. Bhd. and Juita Maju Sdn. Bhd. and both of them have confirmed H/P loans from your company for loan amounts of RM96,000.00 and RM70,000.00 respectively i.e. total H/P loan RM166,000.00, you are requested to contra the account for the floor stocking of these two units.

Thank you.

Yours faithfully,

CAHAYA MOTOR (SABAH) SDN. BHD.

[80] And by way of two letters dated 15 June 1994 (as seen at p 298 of the appeal record) and 20 July 1994 (as seen at p 302 of the appeal record), the defendant made the necessary payments through the issuance of cheques.

[81] It must be emphasised that those two payments were made as a result of the letter from Cahaya Motor and not because the defendant had received the four original documents from the plaintiff.

[82] Be that as it may, the defendant did not make the payment for item

(3) in exh 'P1'. Payment was, in fact, made by Cahaya Motor by way of a bank draft vide SCB Bank draft No 103902 for the amount of RM86,521.09. Moreover, the defendant had never made payment via bank drafts; rather payment by the defendant had always been by way of cheques. In his witness statement at p 97 of the appeal record, DW1 explained the usage of cheques in this way:

> 26 Question: Did the defendant ever make any payments to the plaintiff by way of a bank draft?
>
> Answer: Absolutely not.
>
> Question: Why not?
>
> Answer: Our cheques are good enough.

[83] With respect, the conclusion of learned trial judge of the High Court that just because payments had been made on those two occasions then it could be inferred that the defendant had received and seen all the four original documents was a wrong conclusion. Such an inference was certainly unsafe. Lord Atkin in *Maharaja Sris Chandra Nandy & Anor v Rakhalananda Thakur & Ors* AIR 1941 PC 16, held that:

> If it is not safe from the evidence for the appellate court to draw a particular inference it is also not safe for the trial judge to draw the inference. Not safe must mean that there is no evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases the appellate tribunal may select the inference they choose: but they can have no equal choice between an inference that is safe, and one that is unsafe.

[84] Now, from the moment the plaintiff delivered the Honda cars to the ship until those cars were collected by Cahaya Motor, the plaintiff had full control of the delivery and release of those cars to Cahaya Motor. The defendant would only make payment to the plaintiff upon receipt of the four original documents. These were the security documents which would facilitate the disbursements of the loan. Without those security documents, the defendant was under no obligation to pay.

[85] For the reasons adumbrated above, we unanimously allowed the appeal and set aside the decision of the learned judge of the High Court. We made an order that costs should be given to the defendant here and below. We too ordered that the deposit to be refunded to the defendant.
Defendant's appeal allowed with costs.

Reported by Andrew Christopher Simon